Supreme Court, U.S.
FILED

961901 MAY 27 1997

No. 96-ICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

ALAN D. EMERSON, d/b/a
EMERSON AVIATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

PETITION FOR WRIT OF CERTIORARI

JOHN PIERCE KALLED,
Counsel of Record

KALLED LAW OFFICES
Courthouse Square
Route 171, P.O. Box 130
Ossipee, NH 03864-0130
603.539.2218

Counsel for The Petitioner

May 27, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. The petitioner, Alan Emerson, claimed before trial and upon appeal that the civil penalty which the government seeks to impose upon him is an excessive fine under the Eighth Amendment of the United States Constitution, and under 49 App. U.S.C. §1471(a)(1).

Did the United States court of appeals for the First Circuit err by finding that the $185,000 civil penalty imposed upon him by the district court *is not* excessive under the Eighth Amendment of the United States Constitution, or under 49 App. U.S.C. §1471(a)(1)?

II. The petitioner claimed before trial and upon appeal that after the unusually aggressive enforcement action brought against him by the Administrator of the FAA, the civil penalty action which the government brought against him is a violation of the Double Jeopardy clause of the Fifth Amendment of the United States Constitution.

Did the United States court of appeals for the First Circuit err by finding that the civil penalty action brought against the petitioner *is not* a violation of the Double Jeopardy clause of the Fifth Amendment?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Opinions and Orders Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved ... 2

Statement of the Case 5

Argument 10

Conclusion 30

Appendix ..... App. 1

A. Court of Appeals

1. February 26, 1997 Decision on Appeal ..... App. 1

B. District court

1. April 23, 1996 Order of District Court ..... App. 15

TABLE OF AUTHORITIES

Page

CASES

Alexander v. United States, 509 U.S. 544, 113 S. Ct. 2766, 125 L.Ed.2d 441 (1993) 12

Allen v. Attorney General of Maine, 80 F.3d 56 (1st Cir. 1996) 25

Austin v. United States, 509 U.S. 602, 113 S. Ct. 2801, 125 L.Ed.2d 488 (1993) 11, 12, 13, 14, 15

Browning-Ferris Industries v. Kelco Disposal, Inc., 42 U.S. 257, 109 S. Ct. 2909, 106 L.Ed.2d 219 (1989) 14

Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 114 S. Ct. 1937, 128 L.Ed.2d 767 (1994) 29

FAA v. Landy, 566 F.Supp. 921 (S.D.N.Y. 1982) 18

FAA v. Landy, 705 F.2d 624 (1983) 18

Go Leasing, Inc. v. National Transportation Safety Board, 800 F.2d 1514 (9th Cir. 1986) 22

Johnson v. Securities & Exchange Commission, 87 F.3d 484 (1996) 27, 28

Pangburn v. Civil Aeronautics Board, 311 F.2d 349 (1st Cir. 1962) 22

Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993) 16

United States v. Emerson, 107 F.3d 77 (1997) 12, 17, 25

United States v. Halper, 490 U.S. 435, 109 S. Ct. 1892, 104 L.Ed.2d 487 (1989) 11, 15, 23, 24, 29

TABLE OF AUTHORITIES – Continued

Page

United States v. Pilgrim Market Corp., 944 F.2d 14 (1991) 18

United States v. Stoller, 78 F.3d 710 (1st Cir. 1996) 25, 27

United States v. Ursery & $405,089.23 in United States Currency, ___ U.S. ___, 116 S. Ct. 2135, 135 L.Ed.2d 549 (1996) 24, 25

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment 8 ..... *passim*

U.S. Constitution, Amendment 5 ..... 2, 7, 9, 11, 21, 30

STATUTES

12 U.S.C. §1818(e)(1) 27

21 U.S.C. §881(a) 14, 15

21 U.S.C. §981 24

28 U.S.C. §2462 28

49 App. U.S.C. §1429 ..... 5, 21, 22, 25

49 App. U.S.C. §1471(a)(1) ..... *passim*

49 App. U.S.C. §1471(a)(3)(C) 3, 4

REGULATIONS

14 C.F.R. §61.139 19

14 C.F.R. §91 20

14 C.F.R. §135 ..... 3, 19, 21

49 C.F.R. §821.33 6

PETITION FOR WRIT OF CERTIORARI

Alan D. Emerson respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States court of appeals for the First Circuit entered in this proceeding on February 26, 1997.

OPINIONS AND ORDERS BELOW

The court of appeals' decision on appeal affirming the district court's order is reprinted in Appendix A ("App.") at pages A 1 through 14.

The district court's published order granting the government's request for a civil penalty adjusted to the amount of $185,000.00 is reprinted in Appendix B ("App.") at pages A 15 through 31.

JURISDICTION

The Petitioner respectfully submits that this Court should review this case on writ of certiorari for the reasons that:

1. Pursuant to Supreme Court Rule 10(a), the court of appeals has, by its decision in this case, so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power, and;

2. Pursuant to Supreme Court Rule 10(c), the court of appeals has decided an important question of federal

law under 49 App. U.S.C 1471(a)(1) that has not been, but should be, settled by this Court, and;

3. Pursuant to Supreme Court Rule 10(c), the court of appeals has decided an important question of federal law under the Eighth and Fifth Amendments of the United States Constitution which petitioner submits is in conflict with relevant decisions of this Court.

The court of appeals' order in which it affirmed the judgment of the district court was entered February 26, 1997. The Petitioner filed his Petition for Certiorari within 90 days of that order.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment 8:

Excessive bail shall not be required, nor Excessive Fines imposed, nor cruel and unusual punishments inflicted.

U.S. Constitution, Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor shall

private property be taken for public use, without just compensation.

Title 49 App. U.S.C. 1471(a)(1) and (a)(3)(C). Civil penalties; notice and hearing; compromise; liens.

(a)(1) Any person who violates (A) any provision of subchapter III, IV, V, VI, VII, or XII of this chapter or of section 1501 or 1514, or 1515(e)(2)(B) of this title, or rule, regulation, or order issued thereunder, or under section 1428(i) of this title, or any term, condition, or limitation of any permit or certificate issued under subchapter IV of this chapter, or (B) any rule or regulation issued by the United States Postal Service under this chapter, shall be subject to a civil penalty of not to exceed $1,000 for each such violation, except that a person who operates aircraft for the carriage of persons or property for compensation or hire (other than an airman serving in the capacity of an airman) shall be subject to a civil penalty not to exceed $10,000 for each violation of subchapter III, VI, or XII of this chapter, or any rule, regulation, or order issued thereunder, occurring after December 30, 1987, and except that the amount of such civil penalty shall not exceed $10,000 for each such violation which relates to the transportation of hazardous materials and for each such violation which relates to registration of recordation of an aircraft under subchapter V of this chapter. If such violation is a continuing one, each day of such violation, or each flight with respect to which such violation is committed, if applicable, shall constitute a separate offense. The amount of such civil penalty which relates to the transportation of hazardous materials shall be assessed by the Secretary, or his delegate, upon written notice upon a finding of violation by the Secretary, after

notice and an opportunity for a hearing. In determining the amount of such penalty, the Secretary *shall* take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the ~~per~~son found to have committed such violation, the degree of culpability, any history of prior offenses, *ability to pay, effect on ability to continue to do business, and such other matters as justice requires.* The amount of any such civil penalty for any violation of any provision of subchapter IV of this chapter, or any rule, regulation, or order issued thereunder, or under section 1482(i) of this title, or any term, condition, or limitation of any permit or certificate issued under subchapter IV of this chapter shall be assessed by the Board only after notice and an opportunity for a hearing and after written notice upon a finding of violation by the Board. Judicial review of any order of the Board assessing such a penalty may be obtained only pursuant to section 1486 of this title. This subsection shall not apply to members of the Armed Forces of the United States, or those civilian employees of the Department of Defense who are subject to the provisions of the Uniform Code of Military Justice, while engaged in the performance of their official duties; and the appropriate military authorities shall be responsible for taking any necessary disciplinary action with respect thereto and for making to the Secretary of Transportation or Board, as appropriate, a timely report of any such action taken.

[Nonpertinent portions omitted]

(3) Administrative assessment

(C) Continuing jurisdiction of district courts

> Notwithstanding subparagraph (A), the United States district courts shall have exclusive jurisdiction of any civil penalty initiated by the Administrator –
>
> (i) which involves an amount in controversy in excess of $50,000;
>
> . . .
>
> (iv) in which a suit for injunctive relief based on the violation giving rise to the civil penalty has also been brought.

Pub.L. 102-581, Title II, §208, Oct. 31, 1992, 106 Stat. 4895.

[Emphasis added].

STATEMENT OF THE CASE

On February 15, 1994, The Administrator of the FAA, by the Office of the Assistant Chief Counsel, New England Region, issued an emergency order of revocation of Alan D. Emerson's commercial pilot certificate. This order was issued pursuant to the authority conferred upon the Administrator under 49 App. U.S.C. §1429. The Administrator's order of revocation was issued based on the allegations that between June 8, 1992 and February 8, 1994 Alan Emerson personally, or through an agent or employee, conducted approximately thirty-two flights in violation of various requirements set forth in 14 C.F.R. §135 *et seq.* (referred to generally as FAR).

By complaint dated March 30, 1994, The United States, through the Department of Justice, Office of the U.S. Attorney, District of New Hampshire, sought a civil

penalty against Alan Emerson and an unregistered, unincorporated and defunct trade name, Emerson Aviation, in the amount of $320,000.00 pursuant to 49 App. U.S.C. §1471(a)(1). This complaint was filed, and this civil penalty was sought, on the basis of the same allegedly illegal flights which formed the basis of the FAA's February 15, 1994 emergency order of revocation. On May 10, 1994 Emerson issued his answer denying that he had violated the FAR, and objected to the government's request for a temporary injunction. On May 23, 1994 he moved to dismiss the government's complaint on various grounds, including lack of subject matter jurisdiction, the stale complaint rule under 49 C.F.R. §821.33, excessive enforcement under 49 App. U.S.C. §1471(a)(1) and for placing Emerson in Double Jeopardy.

On June 8, 1994 a hearing was held on the plaintiff's request for a preliminary injunction before U.S. Magistrate Judge William Barry. On August 31, 1994 the government issued its Motion to Amend Complaint wherein it sought to add David Emerson, Alan Emerson's son, as a defendant, and added twenty one additional allegedly illegal flights, which brought the civil penalty sought to $530,000.00. To this motion, Emerson timely objected, but the motion was granted by order of the district court on January 31, 1995. On January 27, 1995 the Magistrate Judge issued his report and recommendation granting the temporary injunction.

On February 6, 1995 Alan Emerson moved for a stay of the injunction and objected to the Magistrate's report and recommendation under F.R.Civ.P. 72. On February 7, 1995, Alan Emerson issued his Answer to the government's Amended Complaint. By orders dated February

14, 1995, Chief Judge Joseph A. DiClerico, Jr. corrected certain errors of fact in the Magistrate's report and recommendation, declared that Emerson's Motion for Stay is moot, and clarified the scope of the temporary injunction. By order dated March 29, 1995, Chief Judge DiClerico denied Emerson's Motion to Dismiss for lack of subject matter jurisdiction.

By Motion dated April 4, 1995, Emerson sought Relief from the March 29, 1995 order pursuant to F.R.Civ.P. 60(b) on the grounds that: the Court's order did not take into consideration the government's Motion to Amend its Complaint nor Emerson's objection to that motion; the government was double-counting alleged violations; the civil penalty action is contrary to the legislative purpose of 49 App. U.S.C. §1471(a)(1), and violates Mr. Emerson's constitutional rights under the Double Jeopardy Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment of the United States Constitution. The Court granted Emerson's motion, treating it as a motion to reconsider its March 29, 1995 order, but denied his motion to dismiss. The case against David Emerson settled shortly thereafter.

The parties filed pretrial statements, requests for findings of fact and rulings of law and pretrial motions on March 7, 1996. In addition, the government filed a trial memorandum, and Emerson filed a Second Motion to Dismiss based upon Double Jeopardy and Excessive Fines Clause grounds. Each party filed requests for findings of fact and rulings of law. In addition, due to the unavailability of what was hoped to be exculpatory documentation, the parties reached an agreement that certain flight operations would be admitted by Mr. Emerson as a

violation in exchange for the government's dropping certain other flights from the complaint. By order dated March 29, 1996, the district court denied Mr. Emerson's Second Motion to Dismiss, addressing *only* his Double Jeopardy argument, concluding that the revocation of his pilot certificate was *remedial*, not punitive. Therefore, no jeopardy attached. The court made no analysis or mention of his Excessive Fines Clause argument, or the limits specified by Congress on penalties to be imposed under 49 App. U.S.C. §1471(a)(1).

The non-jury trial went forward before Chief Judge DiClerico on the issue of the assessment of a civil penalty only, beginning the morning of April 8, 1996. The evidence closed on the afternoon of April 9, 1996. At trial Mr. Emerson introduced uncontroverted evidence that his income at that time was about $1,000 per month, and liabilities exceeded his assets by approximately $88,000.

The district court issued its order on April 23, 1996. (App. 15). The court's findings of fact included the following: in some instances, the FAA's published literature was unclear or inconsistent on the types of flights Emerson could conduct; Emerson relied upon erroneous legal advice from former Attorney Vincent Butler concerning the legality of "private carriage" operations; discussions with a charter operator colleague confirmed Mr. Emerson's understanding of the "private carriage" exception; Emerson's ability to comply with the FAR was hampered by a poor relationship with the FAA's local Flight Standards District Office (FSDO); there is evidence that Inspector Gary Readio personalized his oversight of Emerson, and subjected him to unusually aggressive enforcement activities; Emerson did not intentionally

"hold out" to the public as a charter operator by purchasing yellow pages advertising at a time when he held the proper FAA certifications; some of Emerson's past violations were due to the actions or omissions of his employees. Despite these findings, and the evidence of Mr. Emerson's clear inability to pay a large penalty, the Court ordered a civil penalty in the amount of $185,000. While the district court considered Emerson's ability to remain in business, it ruled that that *was not a relevant consideration* since Emerson was now employed by Emerson Aviation, Inc. (App. 27) From that order, Mr. Emerson appealed.

Mr. Emerson's Notice of Appeal of the district court's order to the court of appeals for the first circuit was filed May 23, 1996. The issues on appeal were: whether the district court's order imposing a $185,000 civil penalty violated the Excessive Fines Clause of the Eighth Amendment of the United States Constitution and the provisions of 49 App. U.S.C. §1471(a)(1); and whether the bringing of the civil action violated the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. The case was accepted, briefed and argued.

On the Excessive Fines Clause argument, the court of appeals found that the district court "made no explicit finding on the Excessive Fines issue." (App. 3) The court acknowledged that " . . . precedent provides no precise guideposts for evaluating a fine's excessiveness, . . . " (App. 5) and that " . . . Emerson appears at present not to have the resources to pay the entire penalty, . . . ". (App. 8). Nevertheless, it concluded that " . . . no barrier apparently exists to his seeking amelioration from the district

court," and affirmed the district court's order, finding "no constitutional error." (App. 8).

On the Double Jeopardy argument, the court of appeals acknowledged that the force of the argument " . . . depends upon the particular circumstances of each individual case, . . . ". (App. 9). After analyzing the FAA's revocation authority, it found that the district court's conclusion that the revocation of Emerson's pilot certificate served a *remedial*, rather than a deterrent or punitive purpose, is correct. Accordingly, it ruled that no jeopardy attached, and affirmed.

ARGUMENT

THE CIVIL PENALTY ORDERED BY THE DISTRICT COURT IN THE AMOUNT OF $185,000.00 IS AN EXCESSIVE FINE

> Excessive bail shall not be required, nor Excessive Fines imposed, nor cruel and unusual punishments inflicted. U.S. Constitution, Amendment 8.

In this case, the district court ordered that judgment be entered in favor of the government against Alan Emerson requiring that he pay a $185,000 civil *penalty*. This is in addition to a permanent injunction, and a more than one-year revocation of his commercial pilot certificate. For a person who flies for a living in northern New Hampshire, a certificate revocation of that duration has the practical effect of preventing him from earning a living for more than a year. This was imposed upon a

man whose assets *before* the fine were shown to be less than his liabilities.

By his April 4, 1995 Motion for Relief from Order, Emerson moved the district court to dismiss the case against him on Excessive Fines, as well as Double Jeopardy grounds, citing *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L.Ed.2d 488 (1993) and *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L.Ed.2d 487 (1989). While the district court acknowledged that Emerson claims that the *in personam* penalties sought by the government are "excessive," in its analysis it addressed only the Double Jeopardy grounds under *Halper*, stating,

> The violation of such regulations would obviously be detrimental to public purposes. Therefore, the court finds that the plaintiff's civil penalty claims against Alan Emerson and Emerson Aviation are *remedial* rather than punitive and the Double Jeopardy clause is not implicated by those claims. [Emphasis added].

The district court did not discuss or apparently consider Emerson's claim that the Excessive Fines Clause warranted dismissal.

Just before trial, Emerson filed his Second Motion to Dismiss, again on the grounds that the government's case against him violated the Excessive Fines Clause of the Eighth Amendment, and the Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution. Again, it did not discuss or apparently consider Emerson's Excessive Fines Clause grounds for dismissal when it denied the motion. The Court did consider Emerson's ability to pay, which is an important consideration, but is not a

substitute for the Constitutional analysis of the Excessive Fines Clause.

Upon appeal to the court of appeals, Emerson argued that this failure of the district court is reversible error. But the court of appeals simply concluded, without meaningful Constitutional analysis, that the district court's reduction of the penalty sought from $370,000 to $185,000 is a "thoughtfully levied fine" which is not excessive, and "does not offend the Constitution." *United States v. Emerson*, 107 F.3d 77, 81 (1997). (App. 8-9). The only authority relied upon by the court in reaching that conclusion was a passage from Justice Scalia's concurring opinion in *Austin v. United States*, 509 U. S. 602 (1993). *Emerson*, 107 F.3d at 80. (App. 5).

However, Justice Scalia was not considering the issue here presented when he wrote the passage cited by the court of appeals. Instead, he was merely describing that in the English Bill of Rights (the origin of the Eighth Amendment), the touchstone of the "excessiveness analysis" is the value of the fine in relation to the offense. *Austin*, 509 U. S. at 627. The petitioner is unaware of any authority from this Court which stands for the proposition that the "excessiveness analysis" under the Eighth Amendment is limited only to comparing the value of the fine to the offense, and the court of appeals cited none.

The Excessive Fines Clause authority from this Court pertinent to this case is set forth in two opinions: one involving an *in personam* criminal forfeiture, and the other involving a civil *in rem* forfeiture. In *Alexander v. United States*, 509 U.S. 544, 113 S. Ct. 2766, 125 L.Ed.2d 441 (1993) the Court considered the defendant's Excessive

Fines claim in the context of an allegedly disproportionate *in personam* forfeiture of his businesses and real estate after he was convicted of tax, obscenity and RICO offenses in the district court of Minnesota. The defendant complained that on top of being sentenced to six years in prison and ordered to pay a $100,000 fine, he was also improperly subject to the forfeiture of his property. The Eighth Circuit court of appeals affirmed.

Upon appeal, this Court observed that the Excessive Fines Clause " . . . limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Id.*, 509 U.S. at 558, *citing Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L.Ed.2d 488 (1993). The Court also observed that "[A]t the time of the drafting and ratification of the [Eighth] Amendment, the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense." *Id.*, 509 U.S. at 558. Applying this analysis, the Court found that the *in personam* forfeiture at issue was clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional "fine." *Id.*, 509 U.S. at 558. The Court therefore held that the forfeiture in the case should be analyzed under the Excessive Fines Clause, and that the court of appeals should have considered whether the forfeiture was excessive in light of the defendant's extensive criminal activities which he conducted over a substantial period of time. *Id.*, 509 U.S. at 559. The Court vacated the judgment and remanded the case for further proceedings.

In the sister case, *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L.Ed.2d 488 (1993), the Court considered whether the Excessive Fines Clause of the Eighth

Amendment applies to a civil *in rem* forfeiture of property under 21 U.S.C. §881(a) following the defendant's guilty plea and sentencing for a charge of possession of cocaine with intent to distribute in the U. S. district court of South Dakota. While the Eighth Circuit court of appeals affirmed below, it did so reluctantly, stating "[T]he principle of proportionality should be applied in civil actions that result in harsh penalties," *Austin*, 964 F.2d 814, 817 (1992), and that the government was "exacting too high a penalty in relation to the offense committed." *Id.*, at 818.

This Court observed that it has previously determined that the purpose of the Eighth Amendment was intended to prevent the government from abusing its power to punish. *Id.*, 509 U.S. at 605, *citing Browning-Ferris Industries v. Kelco Disposal, Inc.*, 42 U.S. 257, 109 S. Ct. 2909, 106 L.Ed.2d 219 (1989). The Court rejected the government's argument that the Eighth Amendment applies only to proceedings that are so punitive as to be considered criminal. The Court ruled that the question is whether the forfeiture is **punishment,** not whether it is civil or criminal.

> In considering this question, we are mindful of the fact that sanctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained **as serving in part to punish.**

Austin, 509 U.S. at 607 [Emphasis added].

The Court analyzed and discussed at length the history of forfeiture under English common law and its own

cases, *Id.*, 509 U.S. at 607-611, and concluded that forfeiture generally, and statutory *in rem* forfeiture in particular, have been understood, at least in part, as punishment. *Id.*, 509 U.S. at 611. Upon examination of the provisions of 21 U.S.C. §881(a) the Court concluded that because the terms of the statute plainly focus upon the *culpability* of the defendant, *id.*, 509 U.S. at 612, and that the enactment of the statute was in recognition of the fact that the penalties of a fine and imprisonment *alone* are not adequate to deter or punish violators of the drug laws, the forfeiture involved is part remedial and part punitive.

> [A] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. [Emphasis added].

Id., 509 U.S. at 613, *citing United States v. Halper*, 490 U.S. 435, 448, 109 S. Ct. 1892, 104 L.Ed.2d 487 (1989).

Following this analysis, the Court held that the forfeiture under the statute is subject to the limitations of the Excessive Fines Clause of the Eighth Amendment, and reversed and remanded the case to permit the lower court to consider the excessiveness of the penalty in the first instance. *Austin*, 509 U.S. at 613.

Excessive Penalty Under 49 App. U.S.C. §1471(a)(1)

The government has proceeded against Alan Emerson under this civil penalty statute, the objective of which is clear from the title itself – civil *penalties*. This is a

substantive interpretation, based upon this Court's common-sense rule requiring that,

> [C]ourts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning.

Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 388, 113 S. Ct. 1489, 1495, 123 L.Ed.2d 74 (1993). But the punitive purpose behind 49 App. U.S.C. §1471(a)(1) is unambiguously tempered by terms which plainly restrain the government's power to punish the defendant.

> In determining the amount of such penalty, the Secretary *shall* take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior offenses, *ability to pay, effect on ability to continue to do business,* and such other matters . . . . [Emphasis added].

49 App. U.S.C. §1471(a)(1).

The question of whether the penalty imposed in this case is "excessive" must be addressed according to the defendant's ability to pay and to remain in business. This requires a fair and common sense analysis of the evidence in the record showing the defendant's net worth and his reasonably probable business prospects. But the court of appeals did not do that. It acknowledged that the district court "made no explicit finding on the Excessive Fines issue," and that " . . . Emerson appears at present not to have the resources to pay the entire penalty, . . . ".

Emerson, 107 F.3d at 80 & 81. (App. 3 & 8). Yet it merely accepted at face value the district court's reduction of the penalty sought to $185,000 as a "thoughtfully levied fine" which is not excessive. *Id.*, 107 F.3d 77 at 81. (App. 7).

Emerson submits that the court of appeals erred by failing to hold the district court to the express limits of the statute. By affirming the district court's order, the court of appeals is permitting the government to not only impose a penalty which Emerson cannot pay, and which will surely put him out of business, it is permitting the government to use 49 App. U.S.C. §1471(a)(1) to financially destroy him. There is nothing in the statute or its history which suggests that Congress granted power of this magnitude, or intended such a ruinous result. Even the court of appeals seems unsure of the soundness of its decision when it observed that

> . . . if Emerson's future prospects become more clearly limited, and the fine becomes more clearly onerous, no barrier apparently exists to his seeking amelioration from the district court.

Emerson, 107 F.3d at 81. (App. 8). Emerson submits that a penalty which will financially ruin him, and which will surely put him out of business *cannot* become *more* clearly onerous.

The statutory terms requiring consideration of the defendant's ability to pay and the effect on his ability to continue to do business also invite an inquiry into whether the penalty is disproportionate to other penalties imposed in similar cases.

In *FAA v. Landy*, 566 F. Supp. 921 (1982), *affirmed* 705 F.2d 624 (1983), a jury found that defendant Landy conducted forty-three flights in three Boeing 707's which he owned in violation of the FAR, resulting in 1,162 separate violations. The evidence showed that he was a man of "considerable wealth." His codefendant, International Aircraft Leasing, Inc. was jointly involved in the violations. The evidence showed that IAL, Inc. made as much as $60,000 on any one of the forty-three flights involved. The civil penalty imposed against this wealthy man was $378,000, and the civil penalty against IAL, Inc. was $189,000.

The latter penalty is nearly identical to that imposed in the present case. But Mr. Emerson submits that when comparing the scope and size of his operations, his business, his "profits" and his ability to pay with that of Landy and IAL, Inc., there is a wide disparity between them. None of his flight operations, sales or other services generate anywhere near $60,000 per transaction, and there is insufficient evidence in the record to fairly justify the disproportionality of the penalty imposed upon him.

In *United States v. Pilgrim Market, Corp.*, 944 F.2d 944 (1991), the First Circuit court of appeals considered whether a $200,000 fine imposed for the crime of selling, storing and transporting adulterated meat products under various sections of title 21 U.S.C. violated the Excessive Fines Clause. In its review of the fine and the record, the court of appeals considered the defendant's income, earning capacity, financial resources and the burden that a fine would impose upon the defendant. *Id.*, 14 F.2d at 22, 23. Because the evidence at trial showed that

the defendant company had gross returns of $739,500 in 1989, and $961,651 in 1990, the court affirmed.

By comparison, the evidence in this case plainly shows that during the relevant time period Emerson did not have annual gross income even approaching nearly a million dollars.

The misdeeds which gave rise to this $185,000 penalty are Emerson's conduct of flights under what he believed was a recognized exception to the requirements of 14 C.F.R. §135 *et seq.* Sometime in 1992, Emerson inquired about what type of passenger-carrying flight operations he could legally perform without a charter certificate. AOPA, an aviation trade association, provided at his request FAA Advisory Circular 120-12A which describes how a person can conduct passenger or property carrying flight operations legally without meeting the extensive requirements of 14 C.F.R. §135. As a long-time commercial pilot he was familiar with 14 C.F.R. §61.139, which states, in pertinent part,

> The holder of a commercial pilot certificate may:
>
> (a) Act as pilot-in-command of an aircraft carrying persons or property for compensation or hire;
>
> (b) Act as pilot-in-command of an aircraft for compensation or hire; . . . .

Emerson spoke to other operators in the industry about his plans to conduct private carriage seeking their advice. In combination, the information he obtained supported the proposition that he could legally conduct such passenger or property carrying operations as long as he

had exclusive agreements with a *limited* number of customers. He also acted as an agent for charter operators who would fly the trip for an Emerson customer, wherein Emerson would be paid a commission for arranging the trip. There is no dispute that this practice is legal, and this was confirmed at trial by the testimony of FAA Inspector Readio. Later on, in an incident unrelated to the present case, Mr. Emerson received legal advice from a well-known aviation attorney who gave him an oral opinion that flights under such circumstances are permissible 14 C.F.R. §91 *et seq.* flight operations.

Mr. Emerson's formal education included only high school and a week-long course for his Inspectors Authority certificate as an adjunct to his airframe and powerplant certificate. Most of his knowledge has come from on-the-job training. His wife, Brenda Emerson, the office manger who took care of the billing, telephone and correspondence, has a ninth grade education.

These are the circumstances of his actions which gave rise to the $185,000 civil penalty. Mr. Emerson acknowledges that these actions were inadequate to ensure that his operations did at all times comply with the FAR. In addition, he acknowledges that his actions, and those of others in his company over whom he had control, in failing to keep clear and complete records of his transactions are a contributing cause to his current legal troubles. For these things, Mr. Emerson accepts responsibility, and accordingly, reached an agreement with the government before trial wherein he accepted responsibility for the majority of the flights in question. But he submits that the penalty imposed by the district court and affirmed by the court of appeals is much harsher than the severity of

his violations warrant, and are much harsher than the terms of 49 App. U.S.C. §1471(a)(1) allow.

Based upon the forgoing, and the well-reasoned authorities cited above, Mr. Emerson submits that the civil penalty in this case violates the limitations of the Excessive Fines Clause of the Eighth Amendment, and the terms and legislative purpose of 49 App. U.S.C. §1471(a)(1). Accordingly, he submits the order of the court of appeals should be reversed.

THE CIVIL ACTION BROUGHT BY THE GOVERNMENT SEEKING A $530,000.00 CIVIL PENALTY IS IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The February 1994 Emergency Order of Revocation as "Punishment"

The FAA Administrator revoked Mr. Emerson's commercial pilot certificate under 49 App. U.S.C. §1429 by emergency order dated February 15, 1994 based on the claim that between June 8, 1992 and February 8, 1994, Alan Emerson, either personally or by another, conducted a number of flights in violation of 14 C.F.R. §135 *et seq.* On the heels of this order, the U. S. Attorney for the District of New Hampshire brought the instant civil penalty action on the basis of the same alleged violations of 14 C.F.R. §135 *et seq.* That complaint is dated March 30, 1994.

Mr. Emerson submits that because of the deteriorating relations he has had with the local FAA officials, and the circumstances of this revocation, the revocation order

was carried out principally for purposes of deterrence and punishment.

The court of appeals for the Ninth Circuit reviewed the constitutionality of the FAA Administrator's authority under 49 App. U.S.C. §1429, and described the authority to suspend or revoke an FAA commercial operator certificate as "disciplinary." *Go Leasing, Inc. v. National Transportation Safety Board,* 800 F.2d 1514, 1521 (9th Cir. 1986). In *Go Leasing,* the appellant argued that federal law requires the FAA to first present to a commercial operator a list of violations, and to permit the commercial operator to propose "remedial action" as a condition precedent to suspension or revocation. The Ninth Circuit held that remedial action, a lesser sanction available at the discretion of the Administrator, need not be offered by the Administrator as a condition precedent to the imposition of a "disciplinary" suspension or revocation. *Go Leasing, Inc.,* 800 F.2d at 1522.

The court of appeals for the First Circuit considered a petition to review an order of the Civil Aeronautics Board (predecessor to the NTSB) affirming the order of the FAA Administrator suspending a person's pilot certificate under 49 App. U.S.C. §1429. *Pangburn v. Civil Aeronautics Board,* 311 F.2d 349 (1st Cir. 1962). In *Pangburn,* the Administrator's order was based upon a finding that the petitioner "failed to exercise the degree of care, skill, judgment and responsibility required of an airline transport pilot while operating an aircraft in scheduled air transportation." *Pangburn,* 311 F.2d at 351. The petitioner challenged the decision of the Board on three grounds, only one of which is pertinent to this analysis: that the FAA did not have the statutory authority to suspend his

pilot certificate unless the evidence showed that the petitioner's lack of technical qualifications indicated that "safety in air commerce or air transportation and the public interest" required the suspension. However, the court held that quite apart from the qualifications or competency of a pilot, the Board may order revocation as a "sanction" for "disciplinary Purposes." *Id.*, 311 F.2d at 354.

The meaning of the word "discipline" or "disciplinary" has several meanings, depending on the context of its use, but it includes, " . . . correction, chastisement, *punishment, penalty.*" Blacks Law Dictionary, (5th Ed. 1979); ". . . 5. treatment that corrects or punishes." Webster's New World Dictionary, 401 (1970).

The Double Jeopardy Clause has been found to protect against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 440, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989). Historically, the government, and some courts, have avoided the impact of the Double Jeopardy Clause by classifying the prosecution or the sanction to be imposed as "remedial" or as a non-punitive "civil" sanction. But this artificial classification has been largely eliminated since *Halper*.

> Simply put, a civil as well as criminal sanction constitutes punishment when the sanction *as applied in the individual case* serves the goals of punishment. [Emphasis added].

Halper, 490 U.S. at 448. After reviewing sanctions which serve "remedial" goals and those which serve "punitive" or "retributive" goals, and after recognizing that "punishment" often serves the twin aims of retribution and deterrence, this Court concluded that,

> From these premises, it follows that a civil sanction that cannot fairly be said to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, *is punishment*, as we have come to understand the term.

Halper, 490 U.S. 435, 448. Thus, the Court held that the Double Jeopardy Clause requires that a defendant who has already been the object of a criminal prosecution may not thereafter be subjected to a civil sanction when the latter cannot fairly be characterized as remedial, but only as a deterrent or retribution.

Before trial, Mr. Emerson relied upon *United States v. Halper*, and cases which had interpreted it up to that time, to support his Double Jeopardy Clause argument set forth in his Motions to Dismiss. Nearly two months after the trial in this case this Court decided *United States v. Ursery & $405,089.23*, ___ U.S. ___, 116 S. Ct. 2135, 135 L.Ed.2d 549 (1996). In reviewing its Double Jeopardy Clause case law, the Court ruled that forfeitures under 21 U.S.C. §881 & 981 are *in rem* proceedings which are primarily aimed at the remedial purposes of removing contraband from circulation and discouraging unlawful commerce. *Ursery*, ___ U.S. at ___, 116 S. Ct. at 2147, 135 L.Ed.2d at ___. Because these proceedings were not punishment against

the defendants, the Court reasoned that the Double Jeopardy Clause was not implicated. *Id.* ___ U.S. at ___, 116 S. Ct. at 2149, 135 L.Ed.2d at ___.

In this case, Emerson submits the first "jeopardy" in which he was placed is the revocation of his pilot certificate. The second "jeopardy" is the civil penalty action, which is not in dispute. *United States v. Emerson*, 107 F.3d 77, 81 (1997) ("There is no contention that the civil fine is not punitive.") (App. 9) The district court takes the view that the FAA's certificate revocation was "remedial" in nature because it did not include a fine, and was appropriately tailored to serve the goals of safety in air commerce. In reaching this conclusion, the district court was guided by the decisions in *United States v. Stoller*, 78 F.3d 710 (1st Cir. 1996) and *Allen v. Attorney General of Maine*, 80 F.3d 56 (1st Cir. 1996).

Emerson submits that this Court's decision in *United States v. Ursery & $405,089.23*, ___ U.S. ___, 116 S. Ct. 2135, 135 L.Ed.2d 549 (1996) has in no way diminished the vitality of *Halper* with respect to cases involving a fixed civil penalty provision. And *Ursery* offers little, if any, guidance on the question of whether the FAA's enforcement actions here constitute a predicate for Double Jeopardy purposes.

To be sure, a review of 49 App. U.S.C. §1429 alone suggests that the purpose behind the powers granted to the FAA are only to ensure air safety and airman competence – goals which are not punitive. But the punitive nature of the FAA's most severe enforcement actions are reflected in the progressive forms of enforcement options

available to it. *See FAA General Order 2150.3A.* The punitive nature of the FAA's actions against Alan Emerson in particular are reflected in the terms of the Administrator's revocation order itself: i.e., that Emerson is a recidivist offender who requires especially heavy enforcement measures. It is also reflected in the manner in which he was treated and investigated by the local FAA inspectors.

The Administrator's *General Order 2150.3A, Compliance and Enforcement Program* sets forth the wide discretion the FAA is given in selecting enforcement procedures, aims and objectives.

> The program ranges from educational and remedial efforts, including administrative action, to **punitive** legal enforcement remedies, including criminal sanctions in the most serious cases. [Emphasis added].

In discussing the recommended approach to enforcement by FAA personnel, the Administrator states,

> FAA personnel should consider whether application of **progressive discipline** will achieve the desired compliance. In some circumstances, for example, it may be appropriate to address a first-time violation with a letter of correction. . . . Should that approach prove to fail, it may be necessary to impose a **punitive** legal enforcement action, i.e., a civil penalty or certificate suspension, to produce an adequate **deterrent** to future violations. Repetitive violations by a certificate holder may even demonstrate a lack of qualification warranting certificate revocation. [Emphasis added].

General Order 2150.3A, §204, pp. 18-19. Thus, it is plain that the FAA Administrator has instructed his people to

apply his enforcement powers with *punitive* and *deterrent* measures when prior efforts have failed, and in the most serious or repetitive offender cases. Emerson submits that that describes his case. Therefore it is *punishment* and *deterrence* which motivated the revocation of his pilot certificate in the February 15, 1994 order of revocation.

The First Circuit court of appeals relied upon its decision in *United States v. Stoller,* 78 F.3d 710 (1st Cir. 1996) in ruling against Emerson. He acknowledges that *Stroller* is grounded on facts which share some similarities to those in this case, (a debarment order under 12 U.S.C. §1818(e)(1) is superficially similar to a certificate revocation), but there was no evidence that the FDIC had interpreted and applied its powers in the same way the FAA has in this case, and the defendant *Stoller* did not have the same history of personal animosity with the government's inspectors as Emerson has had with the local FAA inspectors. This is an important distinction. As the court of appeals observed, in analyzing a Double Jeopardy claim such as this, the court must

> [S]hine the light of [its] gleaned understanding on the particular sanction imposed under the particular circumstances on the particular defendant in order to ascertain [the sanction's] character.

Stoller, 78 F.3d at 720.

The D. C. Circuit in *Johnson v. Securities and Exchange Commission,* 87 F.3d 484 (1996) applied a similarly particularized approach in a non-Double Jeopardy case to

determine whether an SEC proceeding resulting in a censure and a six-month disciplinary suspension of a securities industry supervisor was a proceeding for the enforcement of a civil fine, penalty, or forfeiture, pecuniary or otherwise, within the meaning of 28 U.S.C. §2462. The Court reviewed in detail the meaning of the word "penalty,"

> In common usage, a penalty is "the suffering in person, rights or property which is annexed by law or judicial decision to the commission of a crime or **public offense**." Webster's Third New International Dictionary 1668 (1976). For at least a century's legal dictionaries have similarly defined penalty. See Black's Law Dictionary, 1020 (5th Ed. 1979) ("A punishment imposed by statute as a consequence of the commission of an offense."); Ballentine's Law Dictionary 948, (1930) ("An exaction in the nature of a punishment for the nonperformance of an act, or for the performance of an unlawful act, and involving the idea of punishment, whether enforced by a civil or criminal action or proceeding."); 2 Burrill's Law Dictionary (1871) ("A punishment; a punishment imposed by statute as a consequence of the commission of a certain act."); 2 Bouvier's Law Dictionary 323 (1866) ("By penalty is understood, also, the punishment inflicted by law for its violation. . . . "). [Emphasis added].

Johnson, 87 F.3d at 487. Finding that the statute in question was not intended solely to seek damages for compensation of an injury suffered, the court held that a "penalty" as used in 28 U.S.C. §2462 is a form of punishment imposed by the government. *Id.*, 87 F.3d at 488.

This Court made it clear that in determining whether non-monetary penalties run afoul of the Double Jeopardy Clause, the *Halper* analytical approach does not work well, and the "totality of the circumstances" approach developed in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 114 S. Ct. 1937, 128 L.Ed.2d 767 (1994) is appropriate to evaluate whether the Double Jeopardy Clause is implicated.

One of the important circumstances in the case is the effect the certificate revocation has had upon Emerson. For more than a year, this commercial pilot was unable to fly, when his only business activity is aviation. For all practical purposes, this has meant that for more than a year he was unable to effectively earn a living.

Another circumstance is the objective of the revocation. It is clear from the FAA's *General Order 2150.3A* that only an aviator who committed serious regulation violations, or who violated the regulations many times would likely qualify for the uniquely harsh combination of sanctions which have been visited upon Emerson. He is not being "educated" or "trained" to become a better aviator by these sanctions. If his understanding of certain regulations is faulty, as it does appear from the record, or if he lacks the skill or qualification to conduct certain commercial operations, none of the harsh sanctions the FAA has placed upon him will have "remediated" any such shortcomings. Emerson submits that this examination of the objectives of this particular certificate revocation against this particular person leads to one reasonable conclusion: *deterrence* and *punishment* are its primary goals.

CONCLUSION

Mr. Emerson submits that the instant civil penalty action has resulted in a monetary penalty against him which exceeds by a wide margin his ability to pay, or his ability to remain in the only business that he has known as a working adult – commercial aviation. It is not proportional to the violations committed, or to other fines imposed in similar cases. As such, this civil penalty in "excessive" under the Eighth Amendment of the United States Constitution and under 49 App. U.S.C. §1471(a)(1).

Emerson submits further that the FAA's emergency order of revocation, issued only one and one-half months before this civil penalty action was brought, is *"punishment"* for purposes of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, and accordingly, the judgment of the court of appeals should be vacated, and this action should be dismissed with prejudice.

Respectfully submitted,

ALAN D. EMERSON

JOHN PIERCE KALLED (NH Bar 1302)
Counsel of Record
KALLED LAW OFFICES
Courthouse Square, Route 171
P. O. Box 130
Ossipee, NH 03864-0130
603.539.2218
Email:kalleds@worldpath.net

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 96-1627

UNITED STATES OF AMERICA,

Plaintiff, Appellee,

v.

ALAN EMERSON, INDIVIDUALLY, AND
D/B/A EMERSON AVIATION,

Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Joseph A. DiClerico, *U.S. District Judge*]

Before

Cyr, *Circuit Judge*,
Coffin, *Senior Circuit Judge*,
and Lynch, *Circuit Judge*.

John P. Kalled for appellant.

Patrick M. Walsh, Assistant United States Attorney, with whom *Paul M. Cagnon*, United States Attorney, was on brief for appellee.

February 26, 1997

COFFIN, *Senior Circuit Judge.* Appellant Alan D. Emerson has been ordered to pay a civil penalty of $185,000 for numerous violations of federal aviation law.[1] He claims that the assessment violates both the Excessive Fines Clause of the Eighth Amendment and the Double Jeopardy Clause of the Fifth Amendment. We find no constitutional error, and therefore affirm.

I. Factual and Procedural Background

On February 15, 1994, the administrator of the Federal Aviation Administration (FAA) issued an emergency order revoking Emerson's commercial pilot certificate. The action was based on allegations that Emerson was responsible for more than thirty unlawful flights. About a month later, on March 29, 1994, the United States filed the complaint that underlies this appeal, seeking civil penalties based on the same conduct that triggered the FAA order, namely, the operation of charter flights after FAA authorization to conduct such flights had been revoked.[2]

---

[1] The complaint in this case also was filed against Emerson d/b/a Emerson Aviation. Emerson Aviation no longer exists as an enterprise, and we refer throughout this opinion to Emerson individually as the sole defendant/appellant. We note, additionally, that a corporation named Emerson Aviation, Inc. was formed in 1994 after the violations at issue in this case. The "New Emerson" acquired many of Emerson Aviation's operations, assets and liabilities, though no compensation passed from one entity to the other. Appellant's wife is president of New Emerson, and he testified at trial that he is an employee without any role as officer or shareholder.

[2] In May 1992, the FAA had revoked Emerson's "Airman Certificate" and Emerson Aviation's "Air Taxi Certificate," both of which were required for appellant to operate charter flights.

The complaint sought a $10,000 penalty for each alleged violation. An amended complaint later increased the number of asserted violations to fifty-three.

Emerson filed several motions seeking to dismiss the complaint, arguing, *inter alia*, that requiring him to defend the same allegations in both the administrative and civil proceedings constituted a violation of the Double Jeopardy Clause of the Fifth Amendment. He also claimed that the monetary penalties sought were in violation of the Excessive Fines Clause. The district court denied the motions, finding that the FAA's administrative action was remedial in nature, rather than punitive, and that double jeopardy principles therefore were not implicated. The court made no explicit ruling on the excessive fines issue.

In March 1996, Emerson and the United States stipulated to the district court that twenty-six of the flights alleged to be unlawful were operated in violation of applicable federal aviation law and regulations. Eleven of those were round-trip flights, and thus were counted as two separate violations, bringing the total number of

---

In its 1992 order, the FAA found that Emerson " . . . lack[s] the required care, judgment and responsibility . . . " to hold an Airman Certificate. It determined, *inter alia*, that Emerson had operated an aircraft that was not in airworthy condition, having failed to repair a crack that he knew about and that rendered the aircraft unairworthy. The FAA found that an emergency in air safety existed, and it ordered an immediate revocation of both certificates. On appeal, the National Transportation Safety Board upheld the revocations.

admitted violations to thirty-seven.[3] The stipulation left for trial only the issue of the appropriate penalty.

A two-day bench trial was held in April 1996. The court rejected Emerson's claim that he held a good-faith belief that the flights were lawful, and imposed a civil penalty of $5,000 per violation, for a total of $185,000. In reducing the penalty from that requested by the government (at that point, $8,500 per violation, or $314,500), the court noted Emerson's limited financial ability to pay the higher amount. It also found, however, that a significant civil penalty was appropriate in light of the nature, circumstances, extent and gravity of Emerson's violations, his knowledge or reckless disregard of the law, his extensive enforcement history, and the effect of a large penalty in deterring future violators and fostering respect for and compliance with the law.[4]

This appeal followed. Emerson again asserts that imposition of the civil penalty subsequent to the FAA administrative action violates the Double Jeopardy Clause, and contends that the amount of that penalty transgresses the Excessive Fines Clause.

---

[3] Emerson argued before the district court that each round-trip flight constituted only a single violation. The government contended that the applicable precedent required them to be counted as two separate violations. Emerson does not raise this argument on appeal, and we therefore do not consider it.

[4] The court also issued a permanent injunction that, *inter alia*, barred Emerson and Emerson Aviation from performing any aviation-related acts without proper FAA authority to do so.

II. Excessive Fines Issue[5]

The Excessive Fines Clause protects individuals against abusive penalties imposed by the government. *See generally Austin v. United States*, 509 U.S. 602, 606-12 (1993); *id.* at 627 (Scalia, J., concurring in part and concurring in the judgment); *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 266-68 (1989). Although precedent provides no precise guideposts for evaluating a fine's "excessiveness," Justice Scalia has observed that "the touchstone is value of the fine in relation to the offense," *Austin*, 509 U.S. at 627 (Scalia, J., concurring). *See also Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (opinion of Scalia, J.) (assuming for the sake of argument that "excessive fines" means "disproportionate fines").

Here, the court imposed a fine one-half the size of that permitted by the relevant statute, assessing $5,000 for each of Emerson's thirty-seven admitted violations rather than the statutory maximum of $10,000 per violation. *See* 49 U.S.C. § 46301(a)(2).[6] We are persuaded that this penalty, though substantial, is constitutionally permissible. *Cf. United States v. Pilgrim Market Corp.*, 944 F.2d

---

[5] The government contends that Emerson waived this issue by failing to raise it *after* the district court imposed a specific fine, asserting only an abstract claim in pretrial motions that the maximum penalty permitted by statute was excessive. We have doubts that the claim was preserved, but nonetheless choose to consider it briefly. *See Cheffer v. Reno*, 55 F.3d 1517, 1523 (11th Cir. 1995) ("[C]hallenges under the Excessive Fines clause are . . . generally not ripe until the actual, or impending, imposition of the challenged fine.").

[6] At the time of Emerson's violations in 1992 and 1993, this provision was codified at 49 U.S.C.App. § 1471.

14, 22 (1st Cir. 1991) (upholding penalty against Eighth Amendment challenge where fine was less than half the statutory maximum and one-half of the government's recommendation).

We note initially that the district court thoroughly explored Emerson's explanation for the underlying violations, as well as his enforcement history, and found a pattern of persistent disregard of government regulation. The court was unimpressed with Emerson's evidence that he held a good-faith belief that the flights were lawful,[7] and found "particularly unpersuasive" evidence of reliance on advice from counsel. It further rejected Emerson's contention that the large number of admitted violations and the record of his past regulatory problems overstated the severity of his actual conduct:

> It is of no moment that many of the violations involved record-keeping or other technical functions and that none resulted in serious personal injury. The federal aviation laws safeguard public safety as a collective whole and compliance with the entire regulatory scheme, and not just the rules governing matters that have an immediate and direct effect on life and limb, is presumed. The maintenance of proper records and like tasks is a crucial component in the prevention of accidents and, as such, the failure to comply cannot be viewed as a benign violation

---

[7] The court felt that his explanations were based on "convenient interpretations" of federal regulations that "strain[ed] reason and common sense". Opinion at 11.

> simply because of the clerical or technical nature of the violated regulations.

Opinion at 13-14.

We detect no flaw in the court's reasoning that even technical air safety rules are important, and no clear error in its finding that Emerson did, in fact, engage in repeated, highly culpable conduct. *See Sullivan v. Young Bros. & Co.*, 91 F.3d 242, 246-47 (1st Cir. 1996). With this supportable foundation, the conclusion the court drew – that the latest series of violations warranted a significant penalty – is equally unassailable. Moreover, the court recognized that a substantial penalty would be important as a deterrent to potential violators, since "aviation safety rests in large part on voluntary compliance by those who, in all probability, will never face the regulatory scrutiny encountered by the defendants." Opinion at 15.

Despite these conclusions inclining it toward a penalty at or near the magnitude requested by the government, the court did not order such a fine. It gave offsetting effect to Emerson's limited financial resources. Although he continues to earn income from an aviation business and has ownership interests in various real estate and airplanes, the evidence indicated that the properties are heavily mortgaged and that Emerson also owes a substantial tax debt. Based on his economic circumstances alone, the court reduced the penalty from the government's proposed $8,500 per violation to $5,000 per violation, producing the total fine of $185,000.

We are hardpressed to see the "excessiveness" in this thoughtfully levied fine. First, as noted earlier, the "touchstone" is the value of the fine in relation to the

particular offense, not the defendant's means. Moreover, though Emerson appears at present not to have the resources to pay the entire penalty, he is employed and, still in his early 50s, should have longterm future earning potential.[8] In addition, the continuing nature of the obligation has significance beyond the amount; the fact that the debt will remain with Emerson for some time to come is a sobering reality that should discourage him (and deter others) from committing future violations. Additionally, if Emerson's future prospects become more clearly limited, and the fine consequently becomes more clearly onerous, no barrier apparently exists to his seeking an amelioration from the district court.

In short, the district court's judgment reflects a careful balance between Emerson's means and the justifiable punishment for these latest violations. Thus, the fine bears a reasonable relationship not only to the offense but also to the offender. Consequently, it does not offend the Constitution.[9]

---

[8] Emerson testified at trial that New Emerson offers various aviation services to the public, including scenic flights, aircraft maintenance, hangar services, mechanic's work, and flight instruction. Although, as noted earlier, Emerson presently has no ownership interest in the company, New Emerson acquired all of Emerson Aviation's affairs and his future relationship with the company therefore remains to be seen.

[9] Emerson argues that in determining excessiveness we must consider whether the penalty imposed here is disproportionate to such penalties in similar cases, and offers in comparison several cases involving regulatory violations that he claims demonstrate the unfairness of his punishment. We note, firstly, that the proportionality concern in an excessive fines case is generally considered to be a question of "whether

III. Double Jeopardy Issue

Emerson alternatively seeks to invalidate the fine under the Double Jeopardy Clause, claiming that it constituted double punishment in light of the earlier administrative sanction of decertification. There is no contention that the civil fine is not punitive; the issue is the nature of the FAA penalty that preceded it. If the certificate revocation is remedial, rather than punitive, the later fine is permissible.

We recently have established that, in determining whether an administrative action constitutes punishment for double jeopardy purposes, a court must consider

> the totality of the circumstances, including the source of the authority under which the debarment is imposable, the goals underpinning the authorizing statute, the order itself, the purposes it serves, and the circumstances attendant to its promulgation.

United States v. Stoller, 78 F.3d 710, 721 (1st Cir. 1996) (administrative debarment by FDIC); *see also Allen v. Attorney General of State of Maine*, 80 F.3d 569, 573 (1st Cir. 1996) (driver's license suspension). We have recognized that "the force of a double jeopardy claim depends upon the particular circumstances of each individual case," *id.*

---

the fine imposed is disproportionate to the crime committed," *Harmelin v. Michigan*, 501 U.S. 957, 1009 (1991) (White, J., dissenting), not whether a given fine is disproportionate to other fines imposed on other defendants. Although review of penalties in similar cases may be instructive in evaluating the range of penalties appropriate for a given crime, we think it of limited assistance in judging whether a given fine exceeds constitutional bounds.

at 576, and have identified "[t]he pivotal question" to be "whether the sanction, as applied, exacts rough remedial justice," *id.* at 576-77 (footnote omitted).

The district court thoroughly explored the double jeopardy question within this framework. *See* Order of March 29, 1996. We see no need to revisit its conclusion that the FAA's authority and goals are anchored in a concern for air safety. *See* Order at 6-7; *see also, e.g.*, 49 U.S.C.A. § 44701 (previously 49 U.S.C. App. § 1421).[10]

The court further examined whether the FAA's specific enforcement action in this case was tailored to the remedial goals of federal aviation law, and determined that it was. The court noted that the FAA's investigation of Emerson revealed a number of unsafe and unlawful practices, and observed that the decision to limit the defendant's flying privileges was a "logical[ ]" response. It further noted that Emerson was not subject to a monetary fine, which, in some instances, would suggest a punitive goal.

---

[10] This section, *inter alia*, directs the FAA Administrator to "promote safe flight of civil aircraft in air commerce" by prescribing minimum standards "in the interest of safety" for the design and construction of aircraft, regulations "in the interest of safety" for inspecting and servicing aircraft, and minimum safety standards for air carriers. 49 U.S.C.A. § 44701(a), (b). When prescribing regulations and standards, the Administrator must consider "the duty of an air carrier to provide service with the highest possible degree of safety." *Id.* at (d)(1). The Administrator is further charged with acting "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation." *Id.* at (c).

Analogizing the FAA's action here to the administrative decision in *Allen* to suspend the driver's license of an individual arrested for drunk driving, *see* 80 F.3d at 574, the district court noted our holding that the license suspension " 'represents a reasonable effort to protect the public from motorists who have demonstrated a dangerous propensity to drink before they drive.' " It then continued:

> The safety concerns underlying federal aviation laws, no less than those which give rise to state motor vehicle laws, strongly suggest that "[t]he sanction [of certificate or license revocation] therefore is principally in service to a remedial goal."

Order at 9.

We share the district court's perspective that the FAA's actions here were driven by its remedial responsibilities. Indeed, the specific language of the agency's order reflects this focus on considerations of air safety rather than on punishment:

> By reason of the foregoing facts and circumstances, the Administrator has determined that you are not qualified to hold an Airman Certification, in that you lack the required care, judgment, and responsibility. Therefore, the Administrator finds that the safety in air commerce or air transportation and the public interest require the revocation of your Airman Certificate No. 2130849, with all its ratings and privileges. Furthermore, the Administrator finds that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of this Order.

FAA's Emergency Order of Revocation at 5. The "facts and circumstances" to which the order referred included both details of the current violations and a listing of prior violations. Although it unquestionably is true that a governing authority might view this record of unlawful conduct as warranting punishment, the emphasis here is not on slapping Emerson's wrist but on preventing him from continuing to present a safety risk. He is deprived of his Airman Certification not as punishment for bad conduct, but because he is "not qualified." The immediate implementation of the order further buttresses the judgment that it originated out of a concern for safety, not retribution.

Emerson acknowledges that the language of the statute authorizing the license revocation, 49 U.S.C.A. § 44701, suggests that the FAA's only purposes are nonpunitive: to ensure safety and competence in aviation. He contends, however, that the most severe of the available enforcement options – including decertification – are, in fact, punitive, and he cites in support a 1994 memorandum describing aspects of the FAA's "Compliance and Enforcement Program." *See* App. at 311-314. The document notes that the FAA's program ranges from educational and remedial efforts to "punitive legal enforcement remedies, including criminal sanctions." *Id.* at 312. He cites in particular a section of the memorandum that describes "progressive discipline," starting with a letter of correction to a first-time violator and culminating in "a punitive legal enforcement sanction, i.e., a civil penalty or certificate suspension," for offenders who fail to sustain compliance with the law. *Id.* at 313-14.

On the basis of this memorandum, Emerson points out that the FAA Administrator plainly views his enforcement power to include punitive and deterrent measures, and he maintains that it was this punitive power that was used against him in the revocation order. We addressed a somewhat similar argument in *Allen*, 80 F.3d at 574, where the petitioner contended that the increasing length of a driver's license suspension based on the number of offenses reflected a punitive aim. We acknowledged there that tying the severity of a penalty to the number of offenses may indicate a retributive intent, but pointed out that it also may reflect a protective intent. The escalating suspensions, we observed, reflected a desire to protect the public from those who, on average, present the greatest safety hazard – recidivist drunk drivers.

So, too, here. Following the reference to "punitive legal enforcement sanction[s]" in the FAA memorandum stressed by Emerson, *see id.* at 314, the document states that, "Repetitive violations by a certificate holder may even demonstrate *a lack of qualification* warranting certificate revocation." (Emphasis added.) This is precisely the basis given for revocation of Emerson's certificate. *See supra* at 10 ("[T]he Administrator has determined that you are not qualified to hold an Airman Certification, in that you lack the required care, judgment and responsibility."). Thus, making our conclusion even more compelling than in *Allen*, the remedial nature of the administrative sanction is explicit.

Characterizing the sanction as primarily remedial does not, of course, mean that we must conclude that it has had neither deterrent nor punitive effect. Unquestionably, the loss of his license has had a severe impact on

Emerson and his aviation business. It is equally apparent that the FAA's more serious enforcement measures are designed with deterrence at least partially in mind. Yet, we previously have recognized that "the fact that something akin to punishment occurs along with, and incidental to, a sanction's overriding remedial purpose will not transform a permissible civil penalty into a prohibited multiple punishment," *Stoller*, 78 F.3d at 724. Likewise, the fact that deterrence is among the objectives underlying a civil sanction "is merely one factor to be taken into account in the decisional calculus," *Allen*, 80 F.3d at 576 (citing *Bae v. Shalala*, 44 F.3d 489, 494 (7th Cir. 1995)). Indeed, deterrence should be an anticipated byproduct of aggressive safety enforcement.

We note, finally, Emerson's reliance on *Pangburn v. Civil Aeronautics Bd.*, 311 F.2d 349, 354-55 (1st Cir. 1962), where we held that the Civil Aeronautics Board could order revocation as a sanction for "disciplinary purposes," apart from the qualifications or competency of a pilot. Having such authority does not mean, however, that it is wielded in every case of revocation. Here, as we have explained, the evidence persuades us that the sanction "displays colors more consistent with the remedial end of the spectrum," *Stoller*, 78 F.3d at 721. Consequently, the district court did not err in refusing to dismiss the civil action on double jeopardy grounds.

Affirmed.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

United States of America

v.

Civil No. 94-152-JD
(Filed April 23, 1996)

Alan D. Emerson, Individually
And d/b/a Emerson Aviation

OPINION

The plaintiff, the United States of America, has brought this action against the defendants, Alan Emerson d/b/a/ Emerson Aviation ("Emerson Aviation") and Alan Emerson, individually, to recover a civil penalty for past violations of federal aviation law and to permanently enjoin future violations. On March 29, 1996, the parties stipulated that the defendants are liable for the operation of a number of specifically identified flights. On April 8 and 9, 1996, the court presided over a bench trial to determine whether and to what extent it should grant the government's request for a monetary fine and permanent injunctive relief.

Rulings of Law

1. The parties have stipulated that this action is governed in part by 49 App. U.S.C. § 1471, a civil penalty statute which was in force at the time this action was filed in March 1994.

2. The parties also have stipulated that the following flights were operated by the defendants as charter flights which carried passengers from one point to

another for compensation in violation of 49 App. U.S.C. § 1471 and 14 C.F.R. Part 135:

Date	Customer	Details
December 4, 1992	Pike Industries	Round Trip
December 15, 1992	Pike Industries	Round Trip
April 20, 1993	Pike Industries	Round Trip
June 16, 1993	Pike Industries	Round Trip
March 11, 1993	Wickers Sportswear	
March 12, 1993	Wickers Sportswear	
March 25, 1993	Wickers Sportswear	
March 26, 1993	Wickers Sportswear	
April 14, 1993	Wickers Sportswear	
April 15, 1993	Wickers Sportswear	
April 28, 1993	Wickers Sportswear	
April 29, 1993	Wickers Sportswear	
April 29, 1993	Wickers Sportswear	
May 1, 1993	Wickers Sportswear	
May 18, 1993	Wickers Sportswear	
May 18, 1993	Wickers Sportswear	
May 24, 1993	Wickers Sportswear	
May 25, 1993	Wickers Sportswear	
June 8, 1992	Franklin Brush Co.	Round Trip
September 10, 1992	Franklin Brush Co.	Round Trip
October 29, 1992	Franklin Brush Co.	Round Trip
March 8, 1993	Franklin Brush Co.	Round Trip
April 5, 1993	Franklin Brush Co.	One Way
May 3, 1993	Franklin Brush Co.	Round Trip
June 1, 1993	Franklin Brush Co.	Round Trip
July 16, 1993	Franklin Brush Co.	Round Trip

Joint Stipulation on Liability, 3/29/96

3. The court finds that, based on a common sense reading of the unambiguous statute, a round-trip flight conducted in violation of the federal aviation laws constitutes two separate violations for purposes of calculating

damages. See 29 App. U.S.C.A. § 1471(a)(1) (1994) ("If such violation is a continuing one, each day of such violation, or each flight with respect to which such violation is committed, if applicable, shall constitute a separate offense."). This ruling is consistent with the view that an unlawful trip from a place of origin to an ultimate destination constitutes a single violation but that intermediary stops or flights legs, such as those required for refueling, are incidental and do not constitute additional violations. *See F.A.A. v. Landy*, 566 F. Supp. 921, 924 (S.D.N.Y. 1982) (for purpose of imposing civil penalties, court did not count "the leg of a continuous trip," to an ultimate destination, *i.e.*, each takeoff and landing, as a separate violation), *aff'd*, 705 F.2d 624 (2d Cir. 1983).

4. Thus, as a matter of law, the stipulated unlawful operation of eleven round-trip flights and fifteen one-way flights collectively constitute thirty-seven separate violations subject to a civil penalty.

5. The parties agree that the maximum civil penalty for each violation is $10,000. 49 App. U.S.C.A. § 1471(a)(1) (West 1994).

6. The court's calculation of an appropriate civil penalty requires a fact-specific inquiry:

> Penalties should reflect the nature, circumstances, extent, and gravity of the violation; the culpability, history of prior offenses, ability to pay, and effect on the ability to continue to do business of the person fined; and "other matters as justice may require."

F.A.A. v. Landy, 705 F.2d 624, 635 (2d Cir. 1983) (quoting and adopting considerations from 49 U.S.C. § 1471(a)(1)).

The court finds that the deterrence of other potential violators is an implicit goal of the civil penalty provisions, and therefore a proper penalty consideration, given the government's obvious concern with aviation safety and its heavy reliance on voluntary compliance with aviation laws. *See United States v. Emerson*, No. 94-152-JD, slip op. at 6 (D.N.H. 3/29/96) (noting the aviation statutes' "heavy emphasis" on promoting safety); *accord Landy*, 705 F.2d at 637 (Van Graafeiland, J., dissenting) (noting that "air safety ranks somewhere in pecking order between motherhood and the American flag").

7. The parties also agree that the government is entitled to request a permanent injunction as an additional, equitable remedy for the stipulated violations. The relevant statute in force at the time this action was filed provides that the

> Attorney General . . . may apply to the district court of the United States . . . for the enforcement of such provision of this chapter, rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives from further violation.

49 App. U.S.C.A. § 1487(a) (West 1994).

Findings of Fact

Based on the documentary evidence, trial testimony, and the stipulations submitted by the parties, the court makes the following findings of fact:

A. Enforcement History

1. The defendants' admitted liability in this action is based in part on prior FAA enforcement actions. The defendants agree that they were subject to the following sanctions:

a. On May 12, 1992, the government revoked on an emergency basis Alan Emerson's airman certificate for lacking the care, judgment, and responsibility required of certificate holders. The revocation was effective immediately and was upheld on appeal by the National Transportation Safety Board ("NTSB") on June 24, 1992.

b. On May 12, 1992, the government revoked on an emergency basis Emerson Aviation's air taxi certificate ("ATCO") for operating an aircraft which was not in an airworthy condition, failing to repair aircraft defects, and failing to report aircraft defects to the FAA or the manufacturer. The revocation was effective immediately and was upheld on appeal by the NTSB on June 24, 1992.

c. Following these revocations, the defendants repeatedly violated the federal aviation laws by operating the flights identified in the joint stipulation on liability, listed *supra*.

2. The defendants also have been subject to a number of FAA enforcement actions prior to those giving rise to the instant litigation. At trial the defendants acknowledged that the enforcement history includes the following:

a. On November 2, 1990, the government suspended Alan Emerson's airman certificate for 90

days for entering restricted airspace near Pittsburgh, Pennsylvania without proper authorization. The suspension was upheld on appeal by the NTSB.

b. On August 9, 1991, the qovernment revoked Alan Emerson's flight instructor certificate for making false endorsements in student flight records. The revocation was upheld on appeal by the NTSB.

c. On March 9, 1992, the government retroactively suspended one of Emerson Aviation's air taxi certificates for 365 days for numerous violations of federal aviation regulations.

B. Evidence of Mitigation

3. At trial the court granted the defendants considerable latitude in introducing evidence to mitigate or otherwise explain their admitted violations of the federal law. This evidence included the following:

a. In some instances the FAA's published literature was not entirely clear or consistent on the type of flights the defendants could operate following the revocation of their ATCO. For example, the FAA Advisory Circular distributed on April 24, 1986, and relied upon by the defendants appears to support a limited private carriage exception to the requirement that air carriers possess a Part 135 ATCO.

b. The defendants relied on erroneous legal advice from attorney Vincent Butler concerning the legality of certain flights operated without proper FAA authorization. This advice, which was rendered in connection with the Norman Waal flight from Keene, New Hampshire to

Newark, New Jersey, confirmed the defendants' understanding of the private carriage exception.

c. Discussions with Joseph ("Charlie") Smith, the owner of Charter ME., Sanford, Maine, also confirmed the defendants' understanding of the private carriage exception.

d. The defendants' ability to comply with federal regulations was hampered by a poor relationship with government officials. In particular, FAA safety inspector Gary Readio may have personalized his oversight of the defendants' activities and, in turn, may have subjected Emerson Aviation to an unusually aggressive enforcement effort.

e. The defendants' purchase of advertising in the yellow pages and other media was not an intentional effort to hold Emerson Aviation out as a charter provider. The advertising was initially purchased and designed at a time when the defendants were properly certified and this marketing effort was merely continued following revocation.

f. Some of the defendants' past violations resulted from the failure of the defendants' employees to properly maintain company records as instructed.

g. Although involved in at least a few accidents, including the emergency landing of a scenic flight, the defendants' admitted violations of federal law have not directly resulted in serious personal injury.

h. Alan Emerson is a self-educated pilot and mechanic who possesses more than thirty years experience in the New Hampshire aviation industry. He operated Emerson Aviation as a

sole proprietor from 1976 to 1988 without sanction from the FAA.

C. Evidence of Defendants' Ability to Pay

4. Defendant Emerson Aviation, Alan Emerson's sole proprietorship, no longer performs aviation-related businesses.[1]

5. Emerson Aviation, Inc. ("New Emerson") was incorporated by the New Hampshire Secretary of State in March 1994. The president of New Emerson is Alan Emerson's wife, Brenda. Alan Emerson is an employee but not an officer or shareholder of the corporation.

6. New Emerson has succeeded to many of Emerson Aviation's business operations, assets, and liabilities. New Emerson has never compensated Emerson Aviation for whatever assets or goodwill it acquired from Emerson Aviation.

7. According to a January 17, 1995, financial statement, the defendants have an ownership interest in, *inter alia*, several aircraft, business real estate, including aircraft hangers and office space, located at the Laconia, New Hampshire airport, and residential real estate in

---

[1] For purposes of this opinion and the assessment of the civil penalty Alan Emerson and his sole proprietorship, Alan Emerson d/b/a Emerson Aviation, are treated as the same financial entity, with the assets and liabilities of the business chargeable to the individual. *See Black's Law Dictionary* at 1392 (6th ed. 1990) ("sole proprietor is soley liable for all the debts of the business"); *see also In re San Juan Dupont Plaza Hotel Fire Litig.*, 45 F.3d 569, 573 (1st Cir. 1995) (relying on law dictionary definition of sole proprietorship).

Gilford, New Hampshire and in Stuart, Florida. At the time, Alan Emerson listed the cash value of his assets as $611,500, an amount which included modest accounts receivable and a $15,000 debt owed by A.B.C. Aircraft & Leasing. Most if not all of Emerson's assets are encumbered by mortgages or liens which approach or exceed the total value of the assets. Alan Emerson listed a monthly salary of $1,000.

8. Christopher Tierney, the defendants' accountant, testified that in 1994 his company, A.B.C. Aircraft Leasing, Inc., purchased various aircraft from the defendants for approximately $120,000, $100,000 of which was paid in cash and $20,000 of which Tierney paid in the form of forgiveness for an outstanding professional services debt.

9. Tierney testified that the defendants' financial situation has deteriorated since January 1995, in part because the IRS has filed a blanket lien on all assets for an amount in excess of $160,000.

10. New Emerson owns virtually no assets beyond three aircraft, two of which are currently airworthy and readily saleable and all of which are encumbered to some extent by creditors. New Emerson's business has deteriorated since 1994, in part because of an unprofitable operation in Keene, New Hampshire, adverse publicity related to the instant action, and delays securing FAA approvals and receiving agency guidance for repairs undertaken on behalf of its customers.

Conclusions

The government urges the court to assess a civil penalty of $8,500 for each of the thirty-seven violations, for a total penalty of $314,500 and to elevate the current temporary injunction to permanent status. The government justifies its request as necessary to penalize a seasoned violator who has repeatedly threatened public safety in the face of the FAA's enforcement activities. The government also seeks to deter other aviators from engaging in like conduct.

The defendants request leniency on the grounds that their violations are not nearly as egregious "as stated on the cold page of the complaint." The defendants rely heavily on evidence of mitigation and emphasize their limited ability to pay a monetary fine. The defendants also argue that a permanent injunction is unnecessary because they are currently in compliance with the law.

Considering the law and the facts, the court orders the defendants to pay a civil penalty of $5,000 for each of the thirty-seven violation [sic], for a total penalty of $185,000. This penalty is based on the following findings and rulings:

1. The defendants repeatedly violated 49 App. U.S.C. § 1471 by operating the stipulated flights despite the emergency revocation of Alan Emerson's airman certificate and of Emerson Aviation's ATCO. The defendants were fully aware of the revocation and the continued flight operations were either intentional violations of federal law or, at a minimum, were conducted with a reckless disregard of the aviation laws.

2. Prior to the enforcement actions which underlie the stipulated violations, the defendants repeatedly were sanctioned for violations of federal aviation laws. This enforcement history is significant and, based on the evidence before it, the court considers the defendants to be habitual offenders who view the government's regulation of their business with a troubling degree of contempt.

3. The defendants' evidence of the circumstances surrounding their violations has not in any meaningful way mitigated their liability or otherwise discounted the gravity of the stipulated violations for a variety of reasons. The defendants' claim that they believed they operated under a private carriage exception to Part 135 is unavailing. The court considers this and other explanations based on convenient interpretations of federal regulations and the reliance on the advice of counsel and other pilots to strain reason and common sense. The defendants' evidence of their reliance on counsel is particularly unpersuasive. There is no evidence of any written advice provided by counsel concerning the legality of certain activities *prior* to the time the defendants engaged in the activities. For example, the defendants have introduced the November 3, 1993, correspondance from attorney Vincent Butler to the FAA in which Butler states his opinion that the Norman Waal flight from Keene, New Hampshire, to Newark, New Jersey, was a legal personal flight. However, such a letter cannot establish reliance because it plainly was written in response to a government investigation and not as a prophylactic effort on the defendants' behalf to establish the legality of contemplated future conduct. In any event, to the extent the defendants may have secured and relied upon oral legal

advice concerning their conduct, the record contains little if any evidence as to what information counsel was provided prior to the rendering of the advice. Naturally, an attorney's opinion is only as good as the accuracy and completness [sic] of the information upon which it based. Moreover, the defendants' good faith reliance argument is particularly unconvincing given Alan Emerson's considerable aviation experience, his awareness that the FAA was watching him closely and interpreting rules strictly, and the fact that he lied to his son concerning the legality of certain flights.

4. It is evident that the defendants' strained relationship with the FAA magnified the dispute between the parties and may have led the government to proceed against the defendants with unusual vigor. Moreover, the testimony of Alan Emerson, Charlie Smith, and Gary Readio supports the conclusion that the relationship between Mr. Readio and Mr. Emerson became hostile. Finally, the government has repeatedly acknowledged that the instant prosecution is designed, in part, to deter future violations. Nonetheless, the court squarely rejects the theory that the civil penalty should be reduced because the defendants were unjustly singled out as an enforcement target. The defendants operated in a heavily regulated industry in which compliance with a myriad of regulations, some of which to them may appear trivial, is essential to the overall goal of aviation safety. The defendants – not subordinates, attorneys, or other pilots – are responsible for full compliance and such a duty is never excused by the regrettable fact that they had a hostile relationship with Mr. Readio whose responsibility it was to enforce the governmental regulations in question. To

the extent the defendants believed they had been mistreated by Readio, there were other avenues of relief that may have proven fruitful. Failure to comply or simply refusing to engage in a dialogue with the government is not an acceptable response.

5. The court rejects the defendants' contention that the volume of the admitted violations and the past enforcement history overstates the severity of their actual conduct. It is of no moment that many of the violations involved record-keeping or other technical functions and that none resulted in serious personal injury. The federal aviation laws safeguard public safety as a collective whole and compliance with the entire regulatory scheme, and not just the rules governing matters that have an immediate and direct effect on life and limb, is presumed. The maintenance of proper records and like tasks is a crucial component in the prevention of accidents and, as such, the failure to comply cannot be viewed as a benign violation simply because of the clerical or technical nature of the violated regulations.

6. The defendant Alan Emerson is currently employed by New Emerson. The defendant Emerson Aviation is no longer a going concern to the extent that it does not perform any aviation services. Thus, in this case the defendants' ability to continue to do business is not a relevant penalty calculation factor.

7. The defendants' financial resources are minimal in view of their considerable indebtedness. The court finds that the defendants maintain an equity position in a variety of real estate and capital assets such as aircraft, even though most if not all of these assets are securing

the defendants' outstanding debts. It is also plain that the FAA's enforcement activities in general, the instant lawsuit in particular, and the attendant negative publicity have seriously impaired the defendants' and, by virtue of the apparent association, New Emerson's ability to attract and retain customers. Finally, Alan Emerson draws a modest income as an employee of New Emerson and, at age 52, may reasonably be expected to continue working in some capacity for a number of years. In light of these circumstances, the court finds that the defendants' limited ability to pay factors heavily in the civil penalty calculus.

8. The court finds that the FAA lacks the resources to effectively monitor the activities of the many individuals and business entities that fall within its regulatory sphere. As a result, aviation safety rests in large part on voluntary compliance by those who, in all probability, will never face the regulatory scrutiny encountered by the defendants. However, the instant litigation underscores the critical importance of the aviation laws and the serious consequences which befall those who violate them. A significant civil penalty will deter potential violators and, in turn, foster respect for and compliance with the law.

9. The court is inclined to award a civil penalty at or near the magnitude requested by the government given the nature, circumstances, extent, and gravity of the defendants' violations, their high level of culpability, extensive enforcement history, and the high potential to deter future violations. However, the court must take cognizance of the defendants' limited ability to pay the requested penalty and, based on this consideration alone,

will reduce the amount from $8,500 per violation as requested by the government to $5,000 per violation, for a total penalty of $185,000 (37 violations x $5,000).

10. With respect to the request for injunctive relief, the court orders that the terms and conditions of the temporary injunction entered on February 14, 1995, be extended as provided herein. It is the opinion of the court that, given the considerations addressed in conjunction with the civil penalty assessment, *supra*, coupled with the critical goal of aviation safety, such an injunction is necessary to "enforce obedience" with the federal aviation laws. *See* 49 App. U.S.C. § 1487(a). The court notes that in this instance the requested injunction is not unduly burdensome because it merely mirrors the prior FAA enforcement actions by prohibiting the defendants from engaging in any activities for which their FAA licenses or certificates have been revoked and from exceeding the bounds of whatever certificates and licenses they may currently possess. However, the court vacates its February 14, 1995, order to the limited extent that the earlier order required "the defendants to provide a copy [of that order] to each Emerson Aviation employee and to each individual who boards an airplane owned or operated by, or in conjunction with, Emerson Aviation." The defendants are no longer under any duty imposed by this court to inform others of the instant action.

The court is required to describe in reasonable detail the acts to be restrained by an injunction. Fed. R. Civ. P. 65(d). The court enters the following permanent injunction:

A) Alan Emerson, as an individual, shall not perform any aviation-related acts unless and until he validly possesses the proper FAA authority to do so; and

B) Emerson Aviation, as an entity, shall not perform any aviation-related acts unless and until it validly possesses the proper FAA authority to do so. This prohibition includes any conduct which would require an air taxi certificate under 14 C.F.R. § 135 *et seq.*;

C) Both defendants shall comply immediately with all regulations, policies, and orders promulgated by the FAA or other regulatory agencies; and

D) This injunction is binding on the defendant Alan Emerson, as an individual, and defendant Alan Emerson d/b/a Emerson Aviation, an entity, and its officers, agents, employees and others in active concert or participation with it as provided by Fed. R. Civ. P. 65(d).

Summary

The clerk shall enter judgment in the government's favor. The defendants shall pay a civil penalty of $185,000 and shall at all times adhere to the permanent injunction described *supra*.

The February 14, 1995, order is vacated to the extent described by this order.

SO ORDERED.

/s/ Joseph A. DiClerico, Jr.
Joseph A. DiClerico, Jr.
Chief Judge

April 23, 1996

cc: Patrick M. Walsh, Esquire
John P. Kalled, Esquire